DOCUMENT RESUME

ED 167 680 UD 019 194

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TITLE Equality of Opportunity and Equal Protection: Ideas and Interpretation in Flux.
PUB DATE 9 Sep 78
NOTE 24p.; Paper presented at the annual meetings of the American Sociology Association (San Francisco, California, September 5-9, 1978)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS Admission Criteria; *Affirmative Action; Black Power; *College Admission; Cultural Differences; *Educational Opportunities; Equal Education; *Minority Groups; Racism; Social Attitudes; *Social Change; *Supreme Court Litigation
IDENTIFIERS *Bakke (Allan); *DeFunis (Marco Jr)

ABSTRACT

To understand the parameters of the debate over affirmative action is to better comprehend important conflicts within the American national ideology. The dispute over affirmative action has been the vehicle for a discourse about fundamental social understandings. One central aspect of this debate has been over the meaning of the concept of equality of opportunity. Nowhere have different understandings of this concept emerged more sharply and clearly than in recent court decisions concerned with the constitutionality of special admission programs. The Bakke decision represents a reaffirmation by the courts of the traditional, hegemonic conception of the social order which currently prevails. In contrast, the DeFunis ruling challenges this dominant, hegemonic conception. These decisions arguing for the constitutionality of special admission programs suggest that important social changes are occurring in the society. Sociological sources contributing to these changes include the notion of racial justice which emerged from the black political struggle in the 1960s and the concept of institutional racism which came from the attention paid to group cultural differences by social science research. The concepts of cultural differences and cultural bias, coupled with an understanding of institutional racism, have provided the ideological bulwark in defense of affirmative action and special admission programs. (Author/EB)

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EQUALITY OF OPPORTUNITY AND EQUAL PROTECTION: IDEAS AND INTERPRETATION IN FLUX*

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*Paper presented at the Annual Meetings of the American Sociology Association on September 5-9, 1978, in San Francisco, California.

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The recent United States Supreme Court decision, Regents of the University of California v. Bakke,[1] is the latest entry in the continuing controversy over special admissions and affirmative action programs.[2] The inability of the nine Supreme Court Justices to reach a genuine consensus is a reflection of the prevailing divisions in society concerning the morality and legality of these special policies designed to promote greater social, political, and economic inclusion of racial minorities into American society.[3]

There is not strong public support for affirmative action programs. It is a policy which was produced in a political and social milieu quite different from the one in which these programs have come to operate and develop. These programs remain the last public institutional response to the paramount domestic concern of the 1960's; namely, racial inequality. For those still actively committed to reducing racial inequality, this policy represents the only major mechanism currently available to realize this objective. Proponents of affirmative action programs continue to embrace the open, self-consciously moral spirit of social reform that characterized the politics of the 1960's.

Yet, affirmative action programs, a legacy of the spirit of the 1960's, conflict with the sentiment of the 1970's. Opposition to affirmative action now seems consistent with the heightened concern for limited resources and limited opportunities. Opponents to affirmative action question the ability and, indeed, the right of individuals and institutions to engineer social change. This position on affirmative action typifies the new morality of the 1970's which focuses more on the limits imposed by the social order than on the potentialities of the society to actively construct the good, just, and equitable society. Instead of perceiving affirmative action as a method to reduce social inequality, these programs have become identified with depriving those members of the society not "socially favored" by special group status from competing equally for the limited rewards which the society can bestow. The term "reverse discrimination" has become synonymous with the term affirmative action.[4]

Even more broadly, the unique political and social milieu of the 1960's resulted in the emergence of a new constellation of attitudes and policy positions which challenged prevailing ideological conceptions of the social order. New understandings emerged of how the society ought to be organized and what principles should guide its functioning. New emphasis was placed on the problem of inequality; greater value was placed on the creation of community. Correspondingly, less attention was directed to the protection of individual liberty; the limit to a society successful in creating autonomous, though isolated, individuals was recognized. Through the debate over affirmative action, in this decade, these new understandings are contending with the old. That is why the debate is so intense, widespread, and important.

To understand the parameters of the debate over affirmative action is to better comprehend important conflicts within the American national ideology.[5] In this sense, the debate is invested with meaning that transcends particular policy; the dispute over affirmative action has proven to be the vehicle for a discourse over fundamental social understandings.

The affirmative action programs that emerged in the late 1960's and early 1970's reflected a sharp discontinuity in social policy with previous public efforts to reduce the extent of racial inequality in American society. As Nathan Glazer has argued in his book Affirmative Discrimination: Ethnic Inequality and Public Policy, affirmative action and special admission policies bear little resemblance to the policies that have been traditionally employed to promote

greater inclusion of racial minorities in the society.[6] Prior to the policy of affirmative action, the general operant principle to promote greater inclusion was one of securing greater protection for the individual against discrimination on the basis of race, creed, or national origin. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 represented the latest efforts to strengthen the protection of individuals in the society from discrimination.

The Civil Rights Act banned discrimination on account of race, color, religion, and national origin in places of public accommodation, in public education, in Federal programs and Federally-assisted programs, and in most areas of private employment. The Voting Rights Act made illegal state or local action to limit the right to vote. These legislative acts bound in principle economic, political, and educational institutions within the society to comply with a reaffirmed national commitment to fair and equal treatment to all individuals in the society. As such, they represented an extension of civic rights to those groups who constitutionally were protected from discrimination because of group membership but who, in fact, had been denied such protection.

Affirmative action programs, in contrast, do not reflect similar efforts to strengthen the protection of individuals against discrimination. The late 1960's and early 1970's saw, in a much less dramatic and public way, the development of governmental policies designed to promote, in the words of Glazer, "statistical parity."[7] The Equal Employment Opportunity Commission, created by the Civil Rights Act of 1964, began, in the late 1960's, issuing guidelines to employers insisting that they take positive measures to correct racial imbalances in their work force. In other words, policy guidelines from the government asserted that a non-discriminatory policy was not sufficient; employers were required to take concrete measures to increase representation of minority group members where they were under-represented. Thus, government directives concerning hiring and promotion have affected many institutions in the society, if only in the institutions' adoption of implicit measures designed to circumvent the full realization of the goals of affirmative action. Similarly, special admission programs have been created to promote entry of minority group members into educational institutions who might not otherwise qualify under standard criteria. In both instances, the policy focus is on equalizing the position of groups in the society, not on strengthening protections for individual members of the society.

The development of policy which focuses on the group nature of the problem of racial inequality represents, I believe, a fundamental shift of orientation in social understanding. This new approach reflects a belief in the need to attack the problem of social inequality directly by acknowledging that inequality is a problem of group status, not individual attainment. It represents a rejection of the prevalent belief that social equality can best be achieved through the strengthening of the protection of the individual, irrespective of group membership. It points to the limitations of a society that is committed to the creation of the good, just, and equitable society through the achievement of negative liberty.[8] The achievement of procedural protections against discrimination is not a sufficient response to the problem of racial inequality. Instead, the implicit assumption is that the good society, absent of social inequality, can only be achieved through embracing a conception of positive liberty and substantive justice.

It is important to note that American policy-makers, when confronted with problems of inequality, have, at times, acknowledged the salience of groups in efforts to remedy particular disparities. The public recognition of unions and

collective bargaining is the most obvious example of such recognition.[9] The Court has confirmed the constitutionality of such recognition.[10]

But the formulation of policy on the basis of racial group membership is different, in several respects. Union recognition and the acceptance of collective bargaining was a consequence of class conflict, where individuals similarly situated in the economy, focused on one sphere of private activity, i.e., factories, for recognition and remedy. In addition, the demands were of a kind that they could be transformed into instrumental demands. Racial group conflict, in contrast, does not lend itself to an institutional solution similar to union recognition. It is neither focused on one sphere of private activity nor are the demands purely instrumental. The demands are more far-reaching; they are economic, political, and social in nature. Thus, the recognition of the salience of racial group membership on individuals' lives is a social designation, independent of the individual's relation to the economy, i.e., class position. It is an acknowledgment that the individual's social status is connected to the status of the group and actions by the society toward the individual are linked to the perceptions held by the society of the group.[11] The emergence of affirmative action programs constituted a recognition of racial groups as status groups in the society, and as legitimate objects of social policy.[12] It is that development which has made the programs both significant and controversial.

The shift of public orientation toward the group and toward the need for a direct assault on inequality implies a relaxation of concern and commitment to the strengthening of protections for the individual isolate in the society. It is not an abandonment of concern for the problem of liberty, rather, it is a further illustration of DeTocqueville's insight of the inherent tension which exists in democratic societies between liberty and equality.[13] Both are deeply-held values in American society, but cannot be pursued with equal intensity at the same time. Indeed, in this light, the Court has come to be seen as the final arbiter in determining the appropriate balance between these two contending social impulses. The Bakke decision is a contemporary public expression of the appropriate balance between the reduction of inequality and the protection of individual liberty.

In its broadest expression, the debate over affirmative action concerns the persistence of inequality in America and the extent to whcih the society should, or constitutionally can, be committed to its elimination. The question that the debate poses is whether a democratic society, and institutions within it, can take steps to promote social equality for minority groups through means other than strengthening the protection of individual liberties for all members of the society. Can institutions within a democratic society formulate policy to ameliorate a persistent pattern of inequality? Can the government condone such a policy if it limits the ability of individuals to compete for social rewards irrespective of ascriptive status? Seen in this way, these questions concerning affirmative action represent nothing less than elaborations and interpretation of seminal debates in Western social thought concerning the relationship of the individual to the state and society and, as part of a later debate, the extent to which the government and social institutions are bound and obligated to provide in an affirmative way for its citizens. These questions reflect contending conceptions of the good society. They reflect the tension that exists in democratic societies between the struggle to liberate the individual from social constraints and the desire to create a solidary community, where the presence of certain inequalities are believed to prevent the realization of community.[14]

Equality of Opportunity and the Equal Protection Clause

One central aspect of this debate has been over the meaning of the concept of equality of opportunity. As a value commitment, it is a fundamental precept of the American ideology. It is a conviction that every individual in this society should have the opportunity to develop his or her capacities to the utmost. Moreover, it is an assertion that there should be equal rewards for equal performance. Equality of opportunity is a value asserting the primacy of the individual; neither sex, race, creed, or any ascriptive characteristics should interfere with the possibility of individual achievement. While this value has been sharply criticized by some for its focus on individual achievement in the face of structural inequalities in the society which make individual achievement less possible for some, it, nevertheless, is a value deeply ingrained in American society.[15]

Yet coterminous with the development of the policy of affirmative action there emerged a new understanding of the requisites necessary to achieve equal opportunity in this society. This understanding diverged from the traditional one. Like the rationale for affirmative action programs more generally, the new understanding encompassed an understanding of the salience of group status in affecting life opportunities. It rejected the commitment to individualism traditionally associated with measures to secure equality of opportunity in society.[16] While the commitment to equal opportunity has remained constant, there are now clearly different understandings of the conditions necessary for its realization in American society.[17]

Nowhere have these different understandings emerged more sharply and clearly than in recent court decisions concerned with the constitutionality of special admission programs. The Constitutional commitment to this value is embodied in the "equal protection clause" of the 14th Amendment which guarantees to all persons "the equal protection of the laws." The courts have increasingly come to use the equal protection clause to protect individuals against discrimination because of their membership in various social groups. In so doing, they have demonstrated their commitment to equality of opportunity for any individual in the society. As Robert O'Neil, author of Discriminating Against Discrimination notes,

> although clearly intended by its framers to protect the rights of newly freed blacks, the Courts have found in this clause a flexible weapon against various types of discrimination. Aliens, poor people, city dwellers, illegitimates and others have been the beneficiaries of the post-Civil War concern for the former slaves.[18]

By ruling against discrimination toward groups as a violation of an individual's equal protection under the law, the Court has reflected and reinforced the national commitment to equality of opportunity.

The issue of affirmative action has muddied the waters. Prior to these cases dealing with affirmative action, the Court had only been asked to rule on the issue of discrimination against a particular group and not on the issue of discrimination in favor of anyone.[19] Yet, with the creation of special admission programs came an assertion that equality of opportunity for racial minorities could not be achieved merely through the abolition of "invidious discrimination." Positive steps of incorporation into social institutions were required to insure the achievement of equal opportunity. The question confronting the courts is whether policies intended to provide equality of opportunity through special consideration of racial minorities as a group, i.e., special admission

programs, is consistent with the nation's commitment to equal opportunity or whether those policies violate that doctrine in its discrimination against the white majority. Equality of opportunity as an objective guiding legal policy is not at stake; what is being contended is the meaning of that concept and the policies necessary, both legally and socially, to achieve that goal.

These cases, then, raise two fundamental questions concerning our national commitment to equality of opportunity. First, is that commitment a substantive one or is it procedural? Are we committed as a nation to a goal of reducing persistent group differences, e.g., minority under-representation in professional occupations through the abolition of group inequalities and, thereby, to create the conditions where each individual could have the opportunity to develop his or her capacities to the utmost? Such a commitment implies that the government and social institutions will actively intervene in the society in order to create the necessary conditions for the principle of equal opportunity to be realized. From this perspective, the active creation of community, where group inequalities are absent, is the requisite for the realization of equality of opportunity.

The countervailing position is one that suggests that measures to strengthen individual autonomy is the mechanism by which to realize equality of opportunity in the society. The commitment to the principle of equality of opportunity is procedural in the sense that the government and social institutions can or should do no more than insure that each individual, regardless of ascriptive traits, is accorded the same treatment as any other. In this case, the emphasis is on the necessary limitation of the government and social institutions to intervene directly in social processes except in those cases where the individual suffers from discrimination that interferes with his or her ability to develop personal capacities.

The second question raised concerns the policies by which to promote equality of opportunity. Can equality of opportunity be promoted through color-conscious actions by public and private institutions or must the actions be color-blind? Clearly related to one's understanding of the nature of the commitment to equality of opportunity, this question concerns the extent to which policies can be developed which acknowledge the presence of group inequalities, by race, where policy is formulated which takes account of those group differences. The alternative is to insist on a color-blind social policy without regard to racial differences. In essence, the issue raised is whether the government and institutions within the society can develop a policy which is self-consciously racial and which is designed to promote the interests of particular racial groups. Or, does the recognition of group differences and the formulation of policy directed to that group constitute, by its very nature, an infringement on individual liberties?

These questions, of course, are not new to American society. The attempt to understand the cause of racial inequality and to develop policies consistent with that understanding has been a constant feature of public debate in this country. Yet only with these special admission cases has the Court been asked to rule on the extent and nature of the national commitment to equality of opportunity as it applies to the equal protection clause of the 14th Amendment.

The Bakke decision, both as articulated by the California State Supreme Court and the United States Supreme Court, with one notable exception,[20] represents a reaffirmation by the courts of the traditional, hegemonic conception

of the social order which currently prevails. As such, the ruling is an assertion of the necessity to limit governmental and institutional intervention in the society, regardless of the good that may be achieved from such intervention. Moreover, it is an argument insisting on the need to preserve and promote color-blind social policies, at the institutional level. Cognizant of the dangers of racial classification because of the potential for mis-use, the majority decision adamantly argues against any institutional arrangement which uses self-consciously racial criteria to address the problem of under-representation.

Justice Powell, author of the majority opinion in the United States Supreme Court's Bakke decision, argued that the University of California, Davis, special admission program was unconstitutional because it constituted an infringement of individual rights. "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment."[21] For Powell, the critical legal question centers around the protection of the individual, and the violation of that protection by special admission programs similar to that at Davis. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[22]

The ruling hinges on the interpretation of the 14th Amendment. For Powell, the Amendment can be understood only as a constitutional assertion of the need to treat all individuals in the society similarly. The Amendment requires a literal reading and universal application. "It is far too late," Powell writes, "to argue that the guarantee of equal protection to all persons permits the recognition of special awards entitled to a degree of protection greater than that accorded to others."[23] Justice Mosk, the author of the California State Supreme Court ruling which was upheld by the United States Supreme Court, argued in a similar vein.

> Regardless of its historical origin, the equal protection clause by its literal terms applies to "any persons"; and its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others.[24]

When confronted with the decision to rule in favor of special consideration for racial groups or to secure the protection of the individual, both the Courts ruled in favor of the latter. In justifying this particular interpretation of the law, the California court concluded,

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial inequality. The safest course, the one most consistent with the fundamental interests of all races and with the design of the Constitution is to hold, as we do, that the special admission program is unconstitutional because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution.[25]

In the eyes of the Court, special admission programs are "dubiously expedient" measures violating the principle of equality of opportunity. Promoting

the interests of racial groups, at the expense of individuals in the society as a whole, violates, according to the Court, two cardinal features of the principle of equality of opportunity. It "represents a retreat" in the movement toward equal treatment of each member of the society as an individual judged on his or her individual qualities alone. Moreover, special admission programs threaten the principle of equality of opportunity by its emphasis on racial categories rather than their de-emphasis. As the California court wrote, "the over-emphasis upon race as a criterion will undoubtedly be counter-productive: rewards and penalties, achievements and failures, are likely to be considered in a racial context through the school years and beyond."[26]

Justice Hale, writing the dissenting opinion in DeFunis v. Odegaard,[27] articulates this position most sharply. He writes:

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all, if in the process, we deny equal opportunity to some?[28]

The Court's concern with equality of opportunity, as evidenced by the Bakke decision, was primarily procedural and not substantive. Its main consideration in ruling on the Bakke case was whether special admission programs interfered with a national commitment to the protection of individual liberties. In ruling against the constitutionality of the special admission program at the University of California, Davis, the Court asserted the primacy of procedural guarantees for all individuals in the society. While expressing concern for the substantive problems of racial under-representation in the Medical School at Davis, it argued that protection of the rights of the majority must take precedence. Procedural protections for all individuals must transcend efforts, the Court argued, to counteract inequality through group action.

In concert with its procedural legal orientation, the Court asserted the necessity to preserve a fundamental commitment to governmental and institutional policies which are color-blind. Policies designed to promote equality of opportunity must be individualistic, without regard to group status. In so arguing, the Court reaffirmed a dominant social principle that social policy be directed toward promoting individual achievement through a competitive system of rewards where each individual in the society should be allowed to participate regardless of his or her group membership.

The United States Supreme Court diverged from the California State decision in one important respect. While both argued for color-blind social policies, Justice Powell conceded that race can be taken into account, in admissions proceedings, for example, on an "individualized, case-by-case basis."[29] In this respect, the decision represents a compromise one, where the primacy of the individual and protection of individual rights remains sacrosanct, but the significance of racial group membership in American society is also recognized. This is not an insignificant development, either in the history of the Court or as a reflection of changing American social thought concerning racial relations. It prompted Justice Brennan, author of the major dissenting opinion in the Bakke case, to comment.

> (T)his should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantage cast on minorities by past racial prejudice.... [30]

Despite the significance of this compromise, however, the Court's position was firm in refusing to condone any institutional arrangement self-consciously designed to address the problem of racial under-representation. It refused to deviate from a commitment to color-blind public policies.

Moreover, the Court reaffirmed a basic social commitment to limited governmental and institutional intervention in the social process. The government and social institutions should do no more than insure that individuals are not discriminated against; the promotion of group interests, i.e., action taken in favor of groups, runs counter to the dominant national principle. In the end, the individual is ultimately responsible for his or her acquired social position; neither the government nor social institutions should interfere with the process by which individuals vie for social rewards, except to insure that the competition for these rewards are procedurally fair for all individuals in the society.

It is these dominant social principles which guided the Court and, at the same time, reaffirmed those principles. In terms then, of the operant legal orientation, of the appropriate role of the government and social institutions in the society, and the direction of future social policy, the Bakke decision represents a coherent and cogent argument for the maintenance of the ideological status quo. With the exception of its affirmation of the use of race as an individual attribute, the Bakke decision is an expression of traditional conceptions of the principles which uphold key aspects of social life in the United States. The prevailing understanding of the meaning of equality of opportunity has been upheld.

There has emerged, however, within the legal debate, countervailing principles used forcefully to defend special admission programs. They constitute an alternative understanding of the meaning of the term equality of opportunity, and thus a different interpretation of the equal protection clause.

Those who argue the constitutionality of special admissions programs argue their case in a way that is significantly different from those who perceive the programs as unconstitutional. As I have already described, the argument which asserts the unconstitutionality of these programs begins with the question of individual rights. Given that the presence of a special admission program denies some individuals the ability to compete for certain slots, it is argued a fundamental individual right is being infringed. The conclusion is then drawn that any policy directed to a particular group which denies the right of an excluded group to participate constitutes an infringement upon the rights of the individual as guaranteed by the equal protection clause. In essence, the identification of the fundamental constitutional issue as that of individual rights pre-determines the Courts' decision. They could not rule otherwise.

Those who argue in favor of special admission programs, in contrast, frame the primary question differently. For them, the central issue is that of the constitutionality of racial classification. Rather than beginning the investigation with the concern for the individual, there is the recognition that classification by groups is not constitutionally prohibited. The question then becomes under what circumstances can classification by race be deemed constitutional. Proponents of

special admission programs argue that since classification always creates "in-groups" and "out-groups," the question cannot be framed as a rights issue. Moving from the question of the constitutionality of classification to the question of the individual, and not vice versa, proponents conclude that fundamental individual rights are not in question.[31]

An examination of the ruling by the Washington State Supreme Court in DeFunis v. Odegaard,[32] as well as the dissenting opinions filed in the California dn United States Supreme Court rulings on Bakke, illustrate this different line of argumentation. The DeFunis case was a challenge to the constitutionality of the special admissions program for minority applicants at the University of Washington Law School. Marco DeFunis, Jr., a Caucasian student, charged that he was discriminated against on account of his race, a violation of the equal protection clause of the Fourteenth Amendment. The State Supreme Court of Washington ruled against DeFunis' charges and argued that the University of Washington's special admission program did not violate the relevant provisions of the United States Constitution. While the United States Supreme Court ruled the case moot,[33] the state of Washington ruling was a "landmark" decision, if not for its legal import, then for its sociological significance. The ruling, by a 6-2 vote, was an important endorsement of preferential admissions programs. Moreover, the arguments tendered to defend special admission programs represented the articulation of a coherent body of proposition which challenged the individualistic interpretation of the meaning of equality of opportunity.

In its DeFunis ruling, the Washington State Supreme Court considered the following question:

> whether race can ever be considered as one factor in the admissions policy of a state law school or whether racial classifications are per se unconstitutional because the equal protection of the laws requires that law school admission be "color-blind."[34]

The Court concluded that "the consideration of race as a factor in the admission policy of a state law school is not a per se violation of the equal protection clause of the Fourteenth Amendment."[35] The Court ruled that color-conscious policy is not inherently unconstitutional and, further, that the equal protection clause need not absolutely prevent racial classifications.

The Washington Court ruled that only "invidious" racial classifications, i.e., those which stigmatize a racial group, are unconstitutional. In contrast, classifications which attempt to promote state policies, e.g., racial integration, are not per se violations of the equal protection clause. The Court ruled that the goal of special admissions programs is "not to separate the races, but to bring them together."[36] In other words, the intent of the racial classification must be evaluated to determine the constitutionality of the classification. Thus, the Court ruled that "the Constitution is color-conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation."[37]

The essential difference between the Bakke ruling and the DeFunis ruling is in their interpretation of the equal protection clause of the Fourteenth Amendment. The Bakke ruling insisted on interpreting the equal protection clause by "its literal terms" and "regardless of its historical origin." The fact that the substantive intent of the Fourteenth Amendment, when it was ratified in 1868, was to provide special protection for blacks was immaterial to the California Court. What was salient, however, was the literal meaning of the Amendment which offered

protection for "any persons." In contrast, the DeFunis ruling argued that the historical origin and intention of the Fourteenth Amendment must be taken into account when interpreting the equal protection clause.

Justice Blackmun, in his Bakke dissent, echoed this sentiment. Responding to Justice Powell's assertion that the Fourteenth Amendment has come to embrace a "broader principle" than that for which it was originally intended, Justice Blackmun responded,

> this enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. These original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in this area.[38]

For the Washington State Supreme Court, like the dissenting Bakke opinions, the import of the equal protection clause of the Fourteenth Amendment is not contained in its procedural guarantees to "any persons" but, instead, in its intention to promote and protect the group position of black people in this society. The Court asserts the need to determine the intent of specific social policies, e.g., special admission programs; it is necessary to decide whether such policies promote or detract from the substantive intention of the equal protection clause. Moreover, the Court asserts its competence to use discretion in determining the constitutionality of particular social policies, e.g., special admission programs; it is necessary to decide whether such policies promote or detract from the substantive intent of the equal protection clause.

Legal discretion, related to underlying social purposes, attains primacy in legal decisions; procedural guarantees, though not unimportant, become secondary concerns.[39] In its broadest interpretation, the DeFunis decision affirms increasing discretionary power by the Courts. By implication, it endorses increasing discretionary power by social institutions when related to specific social purposes. It signals a movement away from procedural "rule of law" as the overarching guiding principle of legal interpretation.[40]

Any substantive interpretation of the Fourteenth Amendment, as distinct from a procedural interpretation, imposes on the Court the burden of distinguishing between benign and invidious discrimination; thereby increasing the Court's discretionary power. It prevents the Court from allowing the law to "speak for itself." Substantive interpretation imposes a higher standard of legal interpretation in that both the history of the law and broad social purposes must be taken into account in legal rulings.

The DeFunis decision reflects more than an alternative interpretation of the equal protection clause. It represents a challenge to the dominant, hegemonic conception of equality of opportunity which prevails in this society. The decision questions the assumption that the extent of the national commitment to equal opportunity rests with procedural guarantees. If the equal protection clause was intended to protect blacks as a group from discrimination, the decision implicitly argues, then the United States Constitution endorses special treatment to protect group

interests. The decision asserts that equal opportunity for the individual can only be achieved through a national commitment to the abolition of inequality of particular groups in the society. The only standard for governmental or institutional action need not be the protection of the individual. As Justice Tobriner, in his California State Supreme Court dissent in Bakke writes,

> the simple reality...is that in many circumstances any remedy for the inequities flowing from past discrimination will inevitably result in some detriment to nonminorities. Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by a reallocation of such resources; those who have previously enjoyed a disproportionate advantage must give up some of that advantage if those who have historically had less are able to be afforded an equitable share.[41]

Justice Tobriner's comments reflect the different conclusions drawn when one begins with the problem of group inequality in the society. The issue of the rights guaranteed to individuals does not loom as large.

A substantive commitment to equal opportunity entails an obligation to protect and promote group interests in this society for those who have been historically disadvantaged. In some respects, then, it places group interests ahead of individual protections. Such an orientation requires greater intervention by the government and by social institutions to actively promote preferential treatment for those groups. Moreover, the commitment would necessitate the adoption of color-conscious policies, where individuals would be acted upon, at least in part, in terms of their ascriptive characteristics. These actions and the principles guiding them would be for the purpose of eliminating group inequalities and the promotion of a more solidary community. In all these ways, this substantive commitment represents a sharp deviation from the basic social principles which uphold the procedural commitment to equal opportunity.

The DeFunis decision, and the Bakke dissents, then, are significant because the sociological presuppositions which legitimate their arguments challenge the prevailing conceptions of key aspects of the social order. These represent only a few entries in the public debate over principles of order and organization; their influence is limited in effecting changing presuppositions about society. Nevertheless, the decisions arguing for the constitutionality of special admission programs suggest that important social changes are occurring in the society, of which these legal arguments are but one indication, and that these changes are leading to contending visions and changing values in this society. I would like to discuss briefly two important sociological sources contributing to these changes.

a. Political Factors

Carl Friedrich, in accounting for the origins of political equality, has argued that the struggle for greater equality corresponds to periods of increasing disbelief about the given political arrangements.[42] The quest for greater social equality, it would follow, comes on the heels of increasing disbelief about the given social organization of the society. The Civil Rights movement and the later "black power" movement of the 1960's challenged the legitimacy of the given social arrangements in American society. Those movements convinced large segments of the American population that the presence of a racial hierarchy in this country--whether formally or informally created and enforced--could no longer be tolerated publically.

The Civil Rights legislation of the 1960's and the later development of affirmative action programs were responses to this political agitation. Neither the legislation increasing the protection of individuals against discrimination nor the affirmative measures undertaken to decrease racial imbalance in various sectors of social life would have occurred had it not been for the intense political pressure created by these organized social movements of the 1960's and the accompanying unorganized riots that erupted in black ghettos around the country. But these political movements achieved more than the simple exacting of concessions from a reluctant polity. These movements had a profound impact on the popular conceptions and understandings of the position and special problems of racial minorities in this society.

In an important sense, the black political struggle of the 1960's was an assertion of the "special status" of black people in this society and a demand that the problems that they faced be responded to collectively, as a group, and not through ameliorative measures directed at individual members of the group. Within the black political community, of course, there was a wide variation of specific demands and objectives, ranging from those groups demanding basic civil rights through legislative action to those groups insisting upon reparations from the white community for past wrongs committed and the establishment of a separate black nation. Whether the objective was greater incorporation of blacks into the national polity or increasing separation and autonomy from white American society, black political movements shared in their efforts to define the issue as a group problem particular to racial minorities in this society.

What distinguished the Southern Christian Leadership Conference, the reconstituted Congress of Racial Equality, and the Student Non-Violent Coordinating Committee, for example--all organizations of the 1960's--from such organizations as the National Association for the Advancement of Colored People and the Urban League--organizations which had preceded the renewed black militance--was a new assertion that policy and action by the government be formulated which overtly acknowledged the distinctive differences between the position of whites and blacks in the society. While the movements of the 1960's did not abandon demands to abolish discrimination against individual members of racial minorities, they did add to that demand an insistence on racial justice, an assertion that specific group measures were required to promote the group status of blacks in the society.

The emergence of such a notion of racial justice, in contrast with an emphasis on strengthening protection for individuals against discrimination, challenged the widely-held belief that exacting reforms in the economic arena would promote the position of all people, including racial minorities. Those demanding racial justice asserted that the problem of poverty for non-whites was a consequence of racial injustice; low economic status for racial minorities was not the cause of injustice, it was the result. In short, the absence of racial justice in this society perpetuated economic and other forms of servitude. Poverty was a condition which many whites and non-whites shared; yet poverty for non-whites was a product of different factors and forces. Inequality demanded special forms of redress unique to racial minorities. The concept of racial justice, as the underlying theme of the political movements of the 1960's, promoted a conception of a group problem which could only be ameliorated through a recognition of the "special status" of that group. It asserted the need to adopt color-conscious policies.

In March, 1965, the Office of Policy Planning and Research of the United States Department of Labor published the "Moynihan Report." The report, entitled

"The Negro Family, the Case for National Action," was significant in that it focused specifically on the features of the Negro family, as distinct from families in general. It marked a recognition by the Government of the uniques problems faced by blacks in the society, in contradistinction with poor people in general. While it was extremely controversial for its analysis and policy recommendations, and condemned by many blacks and whites, it signaled an increasing awareness by policy planners of the need for special attention and special recognition of racial groups in this society. As Moynihan acknowledges in the Introduction to the report:

> In this new period the expectations of the Negro Americans will go beyond civil rights. Being Americans, they will now expect that in the near future equal opportunities for them as a group will produce roughly equal results, as compared with other groups. This is not going to happen. Nor will it happen for generations to come unless a new and special effort is made.[43]

Moynihan's "special effort " was one of creating and implementing a national policy to enhance the establishment of a stable Negro family structure. Its larger significance, however, lay in the government's recognition of blacks as a special group in the society, possessing unique features and requiring policy formulation and implementation directed particularly toward that group. Such recognition by the government certainly would not have occurred had it not been for the positive efforts by blacks who, through political action, insisted upon a group definition of their status.

The consequences of black political action extended even beyond such government recognition. Black politics provided the impetus for a virtual black cultural renaissance in the society. This renaissance contributed significantly to a changing conceptualization of racial minorities in this society, both by members of minority groups and by whites as well. The decade saw an enormous burst of creativity in black literature, art, and music where artists self-consciously attempted to come to terms with the unique features of the black experience in America and to understand its linkage with an African past. The blossoming of black expressive forms served as a further impetus to the changing conceptions of blacks as a distinctive social group in American society. Even the insistence on being referred to as "black," and the rejection of "Negro" as an appropriate social designation, reflected this insistence on polarizing racial groups in this society. It was a demand to be seen as distinctive and different.

The slogan of "black power," for example, which emerged as part of a larger political program conceived by SNCC in the South, resonated strongly in black communities throughout the country, even among those not politically active. The slogan typified a feeling of renewed racial pride and an increased assertiveness prompted by both political and cultural actions within the black community. Such developments found similar expression in the Chicano community and among Native Americans, where heightened racial identification became a significant social phenomenon of the decade. In fact, these developments, to a lesser degree, affected the dominant white society, as well, which responded with awakened interest in rediscovering its own ethnic "roots."

At least in the cultural realm, the "melting pot" imagery of American society took a severe beating as a result of the events of the Sixties. The contending image, which gained increasing adherence, was one of autonomous racial and ethnic groups coexisting and each contributing, as component parts, to the national

whole. In addition to appreciating the importance of group differences rather than diluting those differences as a "melting pot" theory is wont to do, such a conceptualization of American society deflected from the more pervasive tendency to view the individual isolate as the most salient unit by which to understand social processes in the society. Thus, with the increasing respect for racial and ethnic group differences in cultural terms and an increasing willingness to understand the individual in terms of his or her group membership, political developments and emergent cultural understandings of the 1960's enabled policy makers to conceptualize and formulate policy which acknowledged such group differences.

Political action in the 1960's for blacks, and other racial minorities, focused on the demand for recognition of a certain group autonomy and an insistence on special redress for racial injustice. The effect was a certain degree of acquiesence by the dominant white society, in general, and policy makers, in particular, to the "group" conception of the social order. It was the combination of an increasing group identification defined by racial membership and the acceptance by the larger society of a concept of racial injustice which led to the adoption of socially ameliorative measures such as special admission programs. It has also led to legal argumentation, though without the force of law, which has legitimated the political claims made by members of racial minority groups. Such argumentation could not have been made, nor even conceptualized, had it not been for these political developments of the 1960's.

b. Ideological Factors

Since Brown v. Board of Education of Topeka[44] in 1954, social science research has been employed in defense of court decisions concerning racial relations in this society. In the Brown case, studies were cited that demonstrated the negative effect of segregation, prejudice, and discrimination on personality development of Negro children. Such evidence buttressed the Court's decision that separate but equal school facilities were unconstitutional.

Concepts derived from social science have played an important role in informing public debate on the issue of racial inequality. Research has helped the formulation of policy designed to improve racial relations in the country. As explanatory concepts changed in social science, so, too, did popular understandings of the nature of the racial problem change. The thrust of public policy altered as well.

Prior to the racial revolution of the 1960's, the concepts of prejudice and discrimination were employed by social scientists to explain racial inequality and to assess its consequences in the society.[45] Racial inequality was a consequence, it was implicitly argued, of prejudice toward certain groups and consequent discriminatory actions toward them. Racial inequality could be reduced or eliminated through policies designed to change attitudes and to legally prohibit discrimination.

Prejudice and discrimination in society prevent all individuals from competing for the available social rewards. It deprives certain individuals, because of their group membership and the presence of prejudice, from achieving their full potential. Racial equality, given this assessment of the nature of the problem, could be achieved through efforts to reduce prejudicial attitudes held by the white community and to protect the individual from discrimination. The legal mandate to integrate schools, for example, was defended on the ground that it would reduce prejudice through increased inter-racial contact and it would, at the same time, prohibit unequal treatment of individuals on the basis

of their racial group membership.

The concepts of prejudice and discrimination, as understood and defined by social scientists, lent themselves to an understanding of the racial problem in America as one where traditional mechanisms for upward mobility were blocked for racial minorities because of prejudiced attitudes and actions by the white majority. Both through cognitive mechanisms, i.e., education and inter-racial contact, and legal mechanisms, i.e., protecting individuals from discrimination, racial inequality could be reduced. The individual would, in time, be able to advance as high as he or she was capable, utilizing the traditional social mechanisms for such advancement, irrespective of racial group membership.

Yet, in the mid- to late 1960's, new concepts by which to understand racial problems in the United States came to largely replace these older ones. Corresponding to the shift of concern in the political world from civil rights to the phenomenon of persistent inequality, racial inequality came to be understood in terms of structural variables. Moreover, its amelioration was possible only through policies that focused on the racial group and the structures of American society, not on the individual. Racial inequality came to be viewed as a consequence of a system of institutional racism, largely immune to fluctuations in individual attitudes. The very operations of the institutions of American society, independent of racist intent, produced and perpetuated racial inequality. Racism was seen as endemic, as built-in, to American society. Neither cognitive strategies nor legal ones were sufficient responses to racial inequality.

The concept of institutional racism was first articulated by Stokely Carmichael and Charles Hamilton in their book, Black Power, published in 1967.[46] This concept came to replace both prejudice and discrimination as the dominant one in race relations research. It held more explanatory power in accounting for the dramatic political struggles that were then taking place. The concept of institutional racism lent itself to an understanding of American society which suggested that the society was incapable of responding to racial inequality through traditional social mechanisms. Policies designed to strengthen the protection of the individual and policies designed to reduce prejudiced attitudes ignored the role that institutions played in unwittingly perpetuating inequality. Only by attacking those institutional structures that served to oppress blacks, as a group, could racial inequality in the society be reduced.

Carmichael and Hamilton described American society as a colonial society; they argued that racial equality could only be realized by challenging the structures of colonialism.[47] There were some adherents who accepted this colonial argument.[48] Many more social scientists, however, despite their rejection of the characterization of American society as a colonial society, accepted the understanding of racism as a structural feature of the society and as one incapable of being rooted out through policies directed at strengthening individual protections.[49] The argument was offered that, given the structural and institutional sources of racism, racial minorities held a special place in American society. Racial problems could not be understood, nor policy formulated, through an understanding of the racially non-specific problems of poverty, unemployment, etc. The reduction of racial inequality could not be achieved without particular attention to the special problems faced by racial minorities in the society.

Otis Dudley Duncan, in an article published in 1968, demonstrated the new importance sociologists imputed to racial group membership. In attempting to explain the high incidence of poverty for blacks, he argued that "Negroes (that is, disproportionate numbers of them) are poor mainly because they are 'Negroes'

and are defined and treated as such by our society and that their poverty stems largely not from the legacy of poverty but from the legacy of race."[50] This ascendance of the structural analysis of race relations, coupled with the recognition of the importance of racial group membership for individuals in the society, marked the triumph of the sociological perspective in academic circles. This perspective, in contrast with a more psychological one which attributed racial problems to non-structural features of the society, has consistently emphasized the relative impermeability of social structure and its differential impact on various groups in the society.

The concept of institutional racism was important for legitimizing an assault on structural arrangements in American society. With that understanding of the role that institutions have continued to play in perpetuating racial inequality, it became possible to demand that institutions self-consciously attempt to alter their policies and procedures. The idea of institutional racism, borrowed from social science, became one of the ideological supports in defense of policies of affirmative action and special admission programs for racial minorities. Without that concept, and without that understanding of the nature of the problem, the ideas of affirmative action and special admission programs would not have crystallized.

To the extent that social scientists concerned themselves with non-structural explanations for racial inequality, attention was largely placed on the concept of culture, and the presence of cultural differences and cultural bias in the society. Where the focus on prejudice identified the individual as the salient unit of analysis, the concept of cultural differences suggested that the patterns, understandings, and values of the group, and the differences between groups, required assessment to understand the causes for inequality. The focus on culture reflected a greater appreciation of how the cultural attributes of the group, and their degree of convergence or divergence with the dominant cultural patterns in the society, affect individual life changes.

Social science research in the 1960's produced many studies of black cultural life.[51] The significance of these studies was to firmly establish the idea that significant cultural differences exist between the white and black communities. The racial community to which an individual belonged profoundly affected his or her experiences, understandings, and values. Moreover, because it was understood that the major social institutions in this society reflect the cultural norms and values of the dominant white society, the individual's chances for success were largely determined by race.

Thus, the appreciation of cultural differences has led to an expectation that individuals from "culturally different" backgrounds, i.e., non-whites, would have a more difficult time competing for the rewards the society can offer because of their cultural differences. Non-competitive performance in achievement tests, under-representation in high-status occupations and professions, etc., by non-whites have been explained as a consequence of cultural factors. The failure of the dominant social institutions in the society to attend to these cultural differences in allocating social rewards is a key example of institutional racism at work.

The attention social science has paid to cultural differences has led to an understanding of differential achievement in this society as a result not of individual capability but of group membership. Thus, under-representation of racial minorities in professional schools has come to be seen as a consequence of

non-white individuals being evaluated in terms of white cultural standards. Cultural bias in achievement tests has become the sine qua non in defense of special admission programs.

The concepts of cultural differences and cultural bias, coupled with an understanding of institutional racism, have provided the ideological bulwark in defense of affirmative action and special admission programs. Both concepts, reflecting the social scientific concerns of the 1960's, embrace a group understanding of social processes. They reject, or modify, the more traditional understanding of social processes as being dependent on individual action. In this sense, the emergence of these concepts along with the political understanding of the 1960's has produced a powerful social and political argument for the need to attack social inequality through group processes and not individual ones.

This new group conception of social organization is important. It has already resulted in the creation and implementation of affirmative action and special admission programs. It has been used by groups other than racial minorities, e.g., women, homosexuals, to explain their "special status" and justify their demands for special treatment. Undoubtedly, new groups will surface and make similar claims. But as these recent court decisions have demonstrated, these new social understandings have not overwhelmed the older principles which focus on the protection of the individual. These traditional understandings have proven to be powerful and enduring.

Affirmative action has served as a vehicle through which these contending conceptions have been debated. Later public issues will serve to determine whether these social principles that emerged in the 1960's have taken root in the public mind or whether they prove to be as ephemeral as the spirit of concern for inequality in America which dominated the last decade, and then diminished.

Notes

1. 98 S.Ct. 2733 (1978)

2. Affirmative action programs generally refer to preference given to special social groups in employment. Special admission programs generally refer to preferences given to special social groups in admission to professional or vocational schools or training programs. While it is important to understand the distinction between these programs, and to recognize that some different legal issues are raised in regard to each, in this article, unless otherwise specified, I use the term affirmative action to encompass both employment programs and special admissions programs.

3. For an interpretation of the meaning and significance of the Bakke decision, see Ronald Dworkin, "The Bakke Decision: Did it Decide Anything?" in New York Review of Books, XXV, 13 (August 17, 1978).

4. While not the subject of this article, it is significant to note the tendency to exaggerate the effect of affirmative action programs on white opportunities. In this respect, opposition to such programs places this era, and this impulse, in continuity with previous period of American history where race has come to play an inordinately significant role in accounting for social difficulties. For example, the Japanese internment during World War II. To this extent, opposition to affirmative action programs has a distinctively racist cast, but, as I shall describe shortly, opposition to affirmative action need not necessarily be a racist response.

5. By national ideology, I mean "a complete system of cognitive assumptions and affective identifications" shared by a population which serves to structure the interpretation of reality, create common norms of behavior and direct activities in accordance with the purposes embodied in the ideology. See Yehoshua Arieli, Individualism and Nationalism in American Ideology, Cambridge: Harvard University Press, 1964; p. 3; also, Karl Mannheim, Ideology and Utopia, New York: Harcourt Brace & World, p. 80.

6. Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy, New York: Basic Books, 1975; Chapter 1.

7. Ibid., Chapter 2.

8. On negative liberty, see Isaiah Berlin, "Two Concepts of Liberty" in his Four Essays on Liberty, New York: Oxford University Press, 1970; pp. 121-131. Both Wilson Carey McWilliams, "Native Sons" in his The Idea of Fraternity in America, Berkeley: University of California Press, p. 604; and Robert Bellah, "Nativism and Cultural Pluralism" in his The Broken Covenant, New York: Seabury Press, 1975, have noted the costs to fraternity and community that have resulted as a consequence of the commitment to negative liberty, particularly as it affects racial minorities.

9. National Labor Relations Act, 1935--the Wagner Act. Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

10. American Steel Foundries v. Tri-City Central Trades Council, 275 U.S. 184; National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

11. Owen Fiss, "Groups and the Equal Protection Clause," Philosophy and Public Affairs, 5, 2, (1976); p. 149. For a more general discussion of the relation between class and status, see Max Weber, "Class, Status, Party," in From Max Weber, Gerth and Mills (eds.), New York: Oxford University Press, 1946; pp. 180-195.

12. Other status groups have been recognized as being entitled to special treatment, e.g., children, the elderly, the handicapped. But these recognitions differ from the recognition of racial group membership as a significant social category. In the former cases, policy involves protection of those groups who are incapable of protecting their own interests. But the protection of these interests does not deprive members of society not included in these categories. In contrast, the recognition of racial group membership implies that gains made in behalf of these groups results in losses to those not similarly classified. Special admissions programs for minority applicants deprives the majority of the ability to compete. In short, the recognition of a racial group as a status group and as a legitimate object of social policy is significant, for it involves policy in every social institution in the society, and, in principle, affects every one in the society, not just those so classified.

13. Alexis DeTocqueville, Democracy in America, Garden City: Anchor Doubleday, 1969; pp. 503-504.

14. Kenneth Karst, "The Supreme Court, 1976 Term--Foreword: Equal Citizenship under the Fourteenth Amendment," Harvard Law Review, 91, 1 (1977); p. 9; Roberto Unger, Law in Modern Society, New York: Free Press, 1976; p. 264.

15. See, for example, John Schaar, "Equality of Opportunity and Beyond" in Equality, Nomos IX, Pennock and Chapman (eds.), New York: Atherton Press, 1967; pp. 228-249. Or, as Wilson Carey McWilliams, op. cit., pp. 604-605, writes, "horse racing is in this respect ahead of social thought; where inequalities exist, those who have been deprived must be preferred if there is to be equal freedom. But horse racing doesn't have to grapple with racism."

16. For an example of this new position, see "Editorial," New York Times, July 2, 1978. "To have a truly fair race, those who once ran with weights must have them lightened and those who ran without must to some degree be handicapped. This is true even if those who lead the race did not themselves impose the handicaps; they have benefited even if they have in conscience opposed them."

17. It is here where this analysis differs sharply from Glazer's, op. cit. Glazer argues that the move to "statistical parity" represents a rejection of the commitment to equal opportunity. I am suggesting instead that the value has remained constant; the debate is directed to the question of what are the organizational social requisites necessary to realize the ideal. In other words, is equality of opportunity possible when there is inequality between distinctive groups in the society? For a critique of Glazer's position, see Troy Duster, "Book Review," American Journal of Sociology, 84, 1, (July, 1978); pp. 252-256.

18. Robert O'Neil, Discriminating against Discrimination, Bloomington: University of Indiana Press, 1975; p. 72.

19. loc. cit.

20. see below, p. 7.

21. Regents of the University of California v. Bakke, 98 S.Ct. 2733 (1978), 2764.

22. Ibid., 2748.

23. Ibid., 2751.

24. Bakke v. Regents of the University of California, 18 Cal.3d 34, 51 [132 Cal.Rptr. 680, 553 P.2d 1152].

25. Ibid., 62-63

26. Ibid., 62

27. DeFunis v. Odegaard, Wash. 507 P.2d 1169 (1973); for complete materials on this case, see DeFunis versus Odegaard and the University of Washington: The Record, Ginger (ed.), Dobbs Ferry, N.Y.: Oceana Publications, 1974, 3 Volumes.

28. DeFunis v. Odegaard, op. cit., 1200.

29. Regents of the University of California v. Bakke, op. cit., 2763n. "So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." Thus, Powell cites the Harvard Plan, where there was a commitment to achieving racial diversity in the student body without any explicit institutional goals or quotas. Moreover, the Harvard Plan was endorsed because competition for the available slots was one-tiered. Every individual was competing against each other. The Davis plan had two separate competitions, one for those considered eligible for special admissions, and a second competition for those that weren't eligible.

30. Ibid., 2766.

31. Justice Brennan, in his Bakke dissent, writes, "unquestionably we have held that a practice or statute which restricts 'fundamental rights' or which contains 'suspect classification' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. But no fundamental right is involved here." Ibid., 2782-3. Also, see Brief for the United States as Amicus Curiae in Regents of University of California v. Bakke: "In our view, only one question should be resolved in the present posture of this case: whether a state university admissions program may take race into account to remedy the effects of societal discrimination. We submit that it may." To which the Respondents Reply to Brief of United States as Amicus Curiae in Regents of University of California v. Bakke respond, "There is but one question.... That question is whether the University of California may lawfully impose a racial quota to govern admission to the Davis Medical School and thereby exclude Allan Bakke from the school solely because of his race." The Brief for the United States suggested that the central question was the question of classification; the respondent's reply argued that discrimination against individuals was the primary question to consider.

32. DeFunis v. Odegaard, op. cit.

33. DeFunis v. Odegaard, 416 US 312 (1974).

34. DeFunis v. Odegaard, Washington, 1178.

35. Ibid., 1181.

36. Ibid., 1179.

37. Ibid., 1180.

38. Regents of the University of California v. Bakke, op. cit., 2807.

39. See Nonet and Selznick, Law and Society in Transition: Towards Responsive Law, New York: Harper & Row, 1978, pp. 14-17, for a discussion of the relation of discretion, purpose and the movement toward responsive law. By responsive law, Nonet and Selznick mean "law as a facilitator of response to social needs and aspirations." In contrast, autonomous law, where efforts are to continually circumscribe discretion, is defined as "law as a differentiated institution capable of tamining repression and protecting its own integrity." Nonet and Selznick would argue, I believe, that the DeFunis decision and other similar decisions where the court attempts to relate discretion to social purpose suggest movement toward responsive law.

40. Fiss, in his article "Groups and the Equal Protection Clause," op. cit., discusses the traditional understanding of the equal protection clause--what I have called the procedural interpretation and what he calls the "anti-discrimination principle." One of the features of this interpretation, according to Fiss, is its acceptance of the norm of value neutrality, or what Roscoe Pound has called "mechanical jurisprudence." Here, legal intervention appears only technocratic, absent of discretion. The DeFunis decision, which implicitly endorses active judicial intervention in realizing substantive social purpose represents a movement away from this technocratic conception of justice. For an extremely persuasive argument for the need for a new substantive interpretation of the equal protection clause, see Karst, op. cit.

41. Bakke v. Regents of the University of California, California, op. cit., 75.

42. Carl J. Friedrich, "A Brief Discourse on the Origin of Political Equality" in Equality, Nomos IX, Pennock and Chapman (eds.), New York: Atherton Press, 1967; p. 220.

43. Daniel Patrick Moynihan, "The Negro Family, the Case for National Action," United States Department of Labor, 1965; "Introduction."

44. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

45. See, for example, Gordon Allport, The Nature of Prejudice, New York: Addison-Wellsley Publishing Co., 1954; Kardiner and Ovesey, The Mark of Oppression, Explorations in the Personality of the American Negro, Cleveland: World Publishing Co., 1951; A. M. Rose, Race, Prejudice and Discrimination, New York: Knopf & Co., 1951.

46. Charles Hamilton, Stokely Carmichael, Black Power, The Politics of Liberation in America, New York: Vintage Books, 1967.

47. Ibid., pp. 34-35. Also, see Robert Blauner, Racial Oppression in America, New York: Harper & Row, 1972.

48. See, for example, Jeffrey Prager, "White Racial Privilege and Social Change: An Examination of Theories of Racism," Berkeley Journal of Sociology, XVII, 1972; also, Tomás Almaguer, "Historical Notes on Chicano Oppression: The Dialectics of Racial and Class Domination in North America," Aztlan, 5, 1 & 2 (1974).

49. See, for example, the collection of articles documenting institutional racism in all spheres of American life in Knowles and Prewitt (eds.), Institutional Racism in America, Englewood Cliffs, N.J.: Prentice-Hall, 1969. Also, Harold Baron, "The Demand for Black Labor: Historical Notes on the Political Economy of Racism," Radical America, 5 (1971).

50. Otis Dudley Duncan, "Inheritance of Poverty or Inheritance of Race?" in On Understanding Poverty, New York: Basic Books, 1968; p. 87.

51. See, for example, Charles Keil, Urban Blues, Chicago: University of Chicago Press, 1966; Elliot Liebow, Tally's Corner, Boston: Little Brown & Co., 1967; Ulf Hannerz, Soulside, New York: Columbia University Press, 1969.